Foreclosure Reversed Because Prior Servicer Agreed To Loan Mod

The District Court of Appeal of Florida, Second District, recently reversed a final judgment of foreclosure, instead directing the trial court to enter judgment in favor of the borrower.

In so ruling, the Appellate Court rejected and disregarded the current servicer's evidence that the loan modification documents had not been received, because the borrowers introduced evidence that they had returned their signed loan modification agreement materials to the prior servicer, the prior servicer received the materials, and the prior servicer accepted the modified payments.

With this evidence, the Appellate Court held that the loan had been modified.

A copy of the opinion is available at: **Link to Opinion.**

Husband and wife borrowers signed a promissory note and mortgage in 2002 and defaulted by failing to make the payment due on Aug. 1, 2009 and subsequent installments. The mortgagee sued to foreclose in June 2010. In July 2014, servicing was transferred to a new servicer, who was substituted in as the plaintiff.

At the bench trial, the borrowers testified that the prior servicer modified their loan in July 2009. They also testified that they signed and returned the required documents via courier delivery in the envelope provided, introduced into evidence the receipt proving the prior servicer received the package, sent the prior servicer three cashier's checks for the first three modified monthly payments, and introduced the cancelled cashier's checks into evidence.

The prior servicer nevertheless sent a letter to the borrowers in December 2009 notifying them that the loan would be accelerated because the payment due on Aug. 1, 2009 was not received. The wife borrower testified she called the prior servicer to find out what had happened to the modification, but was told that the modification had been cancelled in November and they would need to apply again. They did so, but the prior servicer asserted the paperwork was not in its file.

The trial court entered judgment for the mortgagee and the borrowers appealed.

On appeal, the borrowers argued that (a) the trial court erred in finding that they defaulted on the mortgage when the loan had been modified; and (b) that the trial court erred in finding that the mortgagee had complied with the condition precedent clause in the mortgage.

The Appellate Court agreed with the borrowers that the trial court erred by entering a foreclosure judgment when the loan had been modified, but separately addressed "an issue created by the manner in which the final judgment was issued."

The Court reasoned that a valid modification existed because the "three elements of contract formation are present; offer, acceptance, and consideration. No person or entity is bound by a contract absent the essential elements of offer and acceptance." In addition, "'[w]ith a bilateral contract …, acceptance is the last act necessary to complete the contract… [and] "[w]hen the acceptance of an offer is conditioned upon the mailing of the acceptance, the acceptance 'is effective upon mailing and not upon receipt.'"

Because the prior servicer specified what needed to be done to accept its modification offer and the borrowers complied, **the Appellate Court found no merit in the new servicer's argument that the modification documents were never received because "it was the mailing of the documents that constituted an acceptance of the offer, not whether [the new servicer's records] showed that the documents were received."**

The Appellate Court further reasoned that the undisputed evidence reflected that the prior servicer received the first three monthly payments as required. "When a party accepts the benefits under a contract, courts must ratify the contract even if that party contends that it had a contrary intent." In addition, "by accepting the benefits of the loan modification, [the new servicer] cannot now question the validity of the contract. Having entered into a valid modification agreement, [the prior and current servicers] could only foreclose by alleging and proving a breach of the modification agreement and neither of which was done here."

The Appellate Court wrote separately to address, and deplore, the fact that the foreclosure judgement was not entered by the trial judge who heard the evidence, but by another judge. "Nothing in our record establishes or even hints at why a judge, other than the trial judge, entered this final judgment. The entry of a final judgment by a judge who did not preside over the trial, without more, is improper."

Accordingly, the final judgment of foreclosure was reversed, and the case remanded with directions to enter judgment in the borrowers' favor.